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No. 375

In the Supreme Court of the United States

OCTOBER TERM, 1961

GREAT AMERICAN INDEMNITY COMPANY, A CORPORATION, AND JO-DEL RESTAURANT, INC., A CORPORATION, PETITIONERS

v.

THEODORE BRITTON, DEPUTY COMMISSIONER, BUREAU OF EMPLOYEES' COMPENSATION, UNITED STATES DEPARTMENT OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit is reported at 290 F. 2d 381. The opinion of the District Court for the District of Columbia is reported at 186 F. Supp. 938.

JURISDICTION

The judgment of the Court of Appeals was entered on May 4, 1961. A petition for rehearing was denied on June 5, 1961. The petition for a writ of certiorari was filed on August 31, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the district court, in reviewing an administrative award of workmen's compensation benefits, properly set aside the award on a ground it raised *sua sponte*, *i.e.*, whether the deaths in question had arisen out of and in the course of the workers' employment.

STATUTES INVOLVED

The Longshoremen's and Harbor Workers' Compensation Act, made applicable here by the District of Columbia Workmen's Compensation Law (see footnote 2, *infra*), provides in pertinent part:

> 33 U.S.C. 902. Definitions.
>
> When used in this chapter—
>
> * * * * *
>
> (2) The term "injury" means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury, and includes an injury caused by the willful act of a third person directed against an employee because of his employment.
>
> * * * * *
>
> 33 U.S.C. 920.
>
> In any proceeding for the enforcement of a claim for compensation under this chapter it shall be presumed, in the absence of substantial evidence to the contrary—
>
> (a) That the claim comes within the provisions of this chapter.
>
> * * * * *

STATEMENT

Petitioners—an employer and its insurance carrier—brought this action in the district court against the Deputy Commissioner to set aside an award of compensation benefits to the dependents of two musicians killed by two disgruntled customers, who had returned to the employer's restaurant after having been ejected (J.A. 54).[1] The pertinent facts may be summarized as follows:

At approximately 2:00 A.M. on December 27, 1957, Bernard J. Mainer and Kenneth H. Fisher, musicians at the Jo-Del Restaurant in the District of Columbia, were fatally shot by two disgruntled customers (J.A. 55). The dependents of the deceased, the mother of Mainer and the widow and children of Fisher, filed claims for compensation under the District of Columbia Workmen's Compensation law.[2]

At the hearing before the Deputy Commissioner, the petitioners raised only the following issues:

As to the Mainer claim: "Employer-employee relationship,[3] wages and dependency" of the claimant's mother (J.A. 65).

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[1] "J.A.—" refers to the joint appendix attached to the Deputy Commissioner's brief in the Court of Appeals.

[2] The District of Columbia Workmen's Compensation law (D.C. Code (1951 Ed.) 36:501) makes applicable to employment in the District the provisions of the Longshoremen's and Harbor Workers' Compensation Act. 33 U.S.C. 901, *et seq.*; see Pet. App. 1a.

[3] The petitioners had contended that Mainer and Fisher were independent contractors and hence that there was no employment relationship between them and Jo-Del Restaurant, Inc.

As to the Fisher claim: "Employer-employee relationship and wages" (J.A. 65–66).

On each of the issues submitted for his consideration, the Deputy Commissioner, after the taking of extensive evidence (approximately 800 pages), found for the claimants and awarded compensation accordingly (J.A. 18–29).

Thereafter, the petitioners instituted the present action in the district court to have the awards set aside (J.A. 14). In their amended complaint they raised only the same three issues they had raised before the Deputy Commissioner (J.A. 3, 16). The Deputy Commissioner moved for summary judgment upon the ground that the findings as to these three issues were supported by substantial evidence in the record (J.A. 30). The district court agreed and sustained these three findings (J.A. 57). However, as the court below put it, "the court, sua sponte, noted an additional finding which it set aside—namely, that the homicides arose out of and in the course of employment" (Pet. 14a). On that basis, the court denied the Deputy Commissioner's motion and directed judgment for the petitioners (J.A. 57, 64).

On appeal, the Court of Appeals for the District of Columbia Circuit reversed, noting that the issues as to "course of employment" had not been presented to the Deputy Commissioner or to the district court (Pet. 14a). The Court of Appeals further noted that there was no showing "that the claimants would have been unable to present countervailing evidence" on the "course of employment" issue, had they known that evidence on that issue was called for (Pet. 15a). Judge

Bastian dissented. (Pet. 15a). A petition for rehearing was denied *en banc* by the court of appeals, with Chief Judge Miller and Judge Bastian dissenting (Pet. 18a).

ARGUMENT

1. Petitioners seem to concede, as they must, that an issue not raised before the administrative agency cannot be seized upon for the first time in the reviewing court as a basis for upsetting the administrative determination. *E.g., United States* v. *Tucker Truck Lines,* 344 U.S. 33, 37; *Federal Power Commission* v. *Colorado Interstate Gas Co.,* 348 U.S. 492; *Moog Industries, Inc.* v. *Federal Trade Commission,* 355 U.S. 411, 414. Considerations of fairness and of orderly procedure require the parties to come to issue in the forum vested with authority—the Deputy Commissioner in this case—to decide questions of fact. As noted by the court below, this is essential in order to enable the parties to offer all the evidence they believe relevant to the issue which the trier of fact is designated to decide. It is equally essential in order to make certain that the litigants will not be surprised on appeal by a decision there of issues as to which they had no opportunity to introduce evidence. These considerations apply with particular force to workmen's compensation proceedings. The courts have, accordingly, consistently held that, upon judicial review of a compensation award, an issue will be considered as having been waived, and will not be heard by the reviewing court, unless the record shows that it was raised before the Deputy Commissioner. ***Mary-***

land Casualty Co. v. *Cardillo,* 107 F. 2d 959 (C.A.D.C.); *Metropolitan Casualty Ins. Co.* v. *Hoage,* 89 F. 2d 798 (C.A.D.C.); see *Moore Dry Dock Co.* v. *Pillsbury,* 169 F. 2d 988 (C.A. 9); *Bethlehem Steel Co.* v. *Parker,* 163 F. 2d 334 (C.A. 4); *Southern Shipping Co.* v. *Lawson,* 5 F. Supp. 321 (S.D. Fla); *Liberty Stevedoring Co.* v. *Cardillo,* 18 F. Supp. 729 (E.D.N.Y.); *Grain Handling Co., Inc.* v. *McManigal,* 23 F. Supp. 748 (W.D.N.Y.).

2. In seeking to avoid the impact of these settled principles, petitioners assert that the "course of employment" issue was in fact raised and pressed before the Deputy Commissioner. Even if there were record support for this assertion, this factual question is obviously not one warranting further review and evaluation here. In any event, as shown by the opinion below, the record refutes the assertion. It may be, as the dissent below suggests (Pet. App. 16a), that petitioners' initial pleadings in the administrative proceeding did sufficiently present this question, but it is plain that, if once raised, the issue was definitely abandoned in the course of the hearing. As noted in the majority opinion of the Court of Appeals, in direct "response to the Deputy Commissioner's effort to fix the issues for contest, counsel [for the petitioners] specifically limited its denials to the allegations of employer-employee relationships, wages and dependency. Thus the claimants were entitled to believe, as the Deputy Commissioner asserts they did, that the employee and its carrier had withdrawn their denial of the ['course of employment'] allegation now in question" (Pet. 14a–15a). See J.A. 65–66.

Moreover, the fact that this issue was not pressed before the Deputy Commissioner is confirmed by petitioners' complaint, filed in the district court in an attempt to set aside the Deputy Commissioner's award, which does not "challenge the action of the Deputy Commissioner" in finding that the deaths arose in the course of employment (Pet. 15a).

3. While the issue of "course of employment" was not open on judicial review, we think it appropriate to note that, in our view, the present record supports the conclusion that the deaths involved here arose out of and in the course of employment within the meaning of 33 U.S.C. 902(2).

An injury which occurs on the industrial premises, as did those here, is generally presumed to arise out of the employment. *The Travelers Ins. Co.* v. *Cardillo,* 140 F. 2d 10 (C.A.D.C.); *Smoot Sand and Gravel Corporation* v. *Britton,* 152 F. 2d 17 (C.A.D.C.); *Scott* v. *Hoage,* 73 F. 2d 114 (C.A.D.C.). Petitioners' contrary and restrictive view of the Compensation Act's coverage ignores the frequently-restated need for according a liberal interpretation to the Act in order to insure effectuation of its purposes. In rejecting a similarly restrictive view, this Court used language especially pertinent to the facts of this case (*O'Leary* v. *Brown-Pacific-Maxon,* 340 U.S. 504, 506–507):

> * * * We think this is too restricted an interpretation of the Act. Workmen's compensation is not confined by common-law conceptions of scope of employment. *Cardillo* v. *Liberty Mutual Ins. Co.,* 330 U.S. 469, 481; *Matter of Waters* v. *Taylor Co.,* 218 N.Y. 248,

> 251, 112 N.E. 727, 728. The test of recovery is not a causal relation between the nature of employment of the injured person and the accident. *Thom* v. *Sinclair,* [1917], A.C. 127, 142. Nor is it necessary that the employee be engaged at the time of the injury in activity of benefit to his employer. All that is required is that the "obligations or conditions" of employment create the "zone of special danger" out of which the injury arose. * * *

In this case, it can hardly be doubted that it was their employment that put the employees in the "zone of special danger" out of which their deaths arose.

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari should be denied.

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